

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARK D. HAYDON

Claimant

VS.

CITY OF WICHITA

Respondent

Self-Insured

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Docket No. 242,571

ORDER

Claimant requested Appeals Board review of Administrative Law Judge Jon L. Frobish's July 9, 1999, preliminary hearing Order.

ISSUES

This is a claim for multiple work-related injuries caused by specific accidents that occurred on March 16, 1979; January 5, 1982; June 23, 1983; July 2, 1985; and August 6, 1989; plus a series of accidents caused by normal work activities each and every working day until claimant's last day worked of December 28, 1998. Claimant requests medical treatment for these multiple injuries and payment of past medical expenses as authorized medical treatment.

The Administrative Law Judge denied claimant's preliminary hearing requests. He found claimant did sustain work-related injuries from an occupational accident that occurred in 1989 but failed to serve respondent with a timely written claim for that accident. The Administrative Law Judge further found that claimant failed to prove he sustained a series of accidents at work that permanently aggravated and made worse his preexisting conditions. Additionally, even if the claimant had established a continuing aggravation of preexisting conditions, the Administrative Law Judge found claimant failed to provide respondent with timely notice of the accident.¹

In contrast, claimant contends he received multiple injuries through a number of specific accidents while working for the respondent between 1979 and 1989. After those

¹See K.S.A. 44-520.

specific accidents, his normal police patrol duties permanently aggravated and worsened those injuries up through his last day worked. Further, claimant contends he gave timely notice to the respondent of those permanently aggravated injuries by notifying his supervisor before his last day worked. Claimant also contends he served a timely written claim for compensation upon the respondent within 200 days of his last day worked.²

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board makes the following findings and conclusions:

Did claimant suffer an accidental injury that arose out of and in the course of his employment with respondent?

Claimant started working for the City of Wichita as a police officer on January 23, 1978. He took voluntary retirement effective December 31, 1998, with his last day worked of December 28, 1998. During this tenure, claimant worked as a patrol police officer. Claimant described his job duties as patrolling a certain section of the city with his patrol car, physically restraining suspects, running down suspects, getting in and out of the patrol car, and filling out tickets and reports.

Claimant described certain specific accidents that occurred while he worked for the respondent from 1979 through 1989. First, on March 16, 1979, claimant was driving his patrol car in route to assist a fellow officer when he collided with another vehicle. He was taken to a local hospital emergency room and treated for head concussion, bruises, and contusions. After the medical treatment, claimant returned to his regular duties without restrictions. Second, in 1982, claimant was involved in another motor vehicle accident that injured his back and neck. He returned to regular work from this accident without restrictions. Third, on June 23, 1983, claimant wrenched his back struggling with a suspect. After this accident, he returned to regular work without restrictions. Fourth, claimant injured his left upper and right lower extremity while arresting a suspect on July 2, 1985. Again, claimant returned to regular work without restrictions. Fifth, on August 6, 1989, claimant injured his back when he attempted to jump a chain link fence while chasing a suspect. He caught his gunbelt and shoe in the fence and fell. He received medical treatment at a local hospital emergency room. After the medical treatment, claimant returned to regular work without restrictions.

After these five specific accidents, claimant contends his neck and back remained symptomatic and the symptoms worsened as he continued to perform his regular work duties. Claimant also contends that in 1997 and 1998 he started having pain, tingling,

²See K.S.A. 44-520a.

cramping, and swelling in his arms and hands. The symptoms in his arms and hands made it difficult for him to complete written reports.

In 1998 claimant applied for retirement based upon his age and years of service and not disability. He testified he started receiving retirement payments in April 1999. Claimant also testified, as of the date of the preliminary hearing, he had gone through a grievance procedure and had requested his retirement be withdrawn and that he be reinstated to a job with the city as a police officer. But he had not actually been reinstated because the city manager had not made the final decision to reinstate him.

The last specific work-related accident, for which claimant contends he suffered permanent injury, occurred on August 6, 1989. After that accident, respondent provided claimant with medical treatment for his back and neck then claimant returned to his regular job duties without restrictions. No application for hearing or claim for compensation was filed for that accident until March 25, 1999. Therefore, the Appeals Board finds the claim for this particular accident and for all the other accidents that occurred before that date are barred because a timely claim for compensation was not served upon the respondent³ and an application for hearing was not timely filed.⁴

In addition to the specific work-related accidents, claimant also contends his regular work activities that he performed through his last day worked of December 28, 1998, permanently aggravated and worsened his preexisting conditions. A strain sustained by a worker in performing his regular work activities may constitute an accident within the meaning of the workers compensation act.⁵ Also, when a worker has a preexisting condition and the preexisting condition is either aggravated, accelerated, or intensified by another on-the-job accident, the worker is entitled to be compensated for the resulting disability.⁶

Here, claimant testified he had continued pain and discomfort in his neck and back after specific work-related accidents from 1979 through 1989. Claimant also testified the symptoms worsened as he continued to perform his regular police patrolman duties through his last day worked of December 28, 1998. Additionally, claimant testified in 1997 and 1998 he developed loss of feeling in his left leg, loss of feeling in his left upper

³See K.S.A. 44-520a (Ensley).

⁴See K.S.A. 1989 Supp. 44-534(b).

⁵See Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, Syl. ¶2, 573 P.2d 1036 (1978).

⁶See Harris v. Cessna Aircraft Co., 9 Kan. App. 2d 334, 336, 678 P.2d 178 (1984).

extremity, experienced headaches, and swelling in his hands. Claimant attributes these new symptoms to his regular work activities.

But claimant did not retire as a city police officer because of his alleged pain and discomfort in his upper extremities, neck, or lower extremities. In fact, at the time claimant retired, claimant had already secured a job as security officer for the County. Claimant started working for the County on January 4, 1999. Claimant's application for employment with the County was admitted into evidence at the preliminary hearing. Included in the application was a Workers Compensation Questionnaire asking the claimant if he knew or had ever had any impairment. Claimant answered the questionnaire in the negative.

While working for the County, on February 4, 1999, claimant saw his personal physician, Richard S. Piazza, D.O., for complaints in his upper extremities and neck plus headaches. Dr. Piazza's medical records were admitted into evidence at the preliminary hearing. Those records show claimant, over the years, had been treated for a variety of health problems that include type 2 diabetes, obesity, hyperlipidemia, and elbow epicondylitis.

Dr. Piazza referred claimant for an MRI examination of both his lumbar and cervical spine. The MRI examination of the cervical spine revealed herniated disks at C2-3, C3-4, and C6-7. Furthermore, the MRI examination of the lumbar spine revealed spinal stenosis due to facet hypertrophy at L4-5.

After Dr. Piazza discovered the extent of the abnormalities in claimant's cervical spine, his medical note dated February 8, 1999, questioned the cause of the abnormalities. The medical note indicated claimant mentioned the moderately severe motor vehicle accident that occurred while working for the respondent. But there was no mention that claimant had suffered increasing problems while performing work duties after this accident. Dr. Piazza then referred claimant for further examination and evaluation to Michael P. Estivo, D.O.

Claimant saw Dr. Estivo on February 15, 1999. Claimant gave Dr. Estivo a history of his specific work-related accidents and for the first time related that the pain had gradually worsened over the years. Dr. Estivo prescribed physical therapy, lumbar epidural injections, and a two-piece back brace.

At claimant's health insurance company's request, claimant's care and treatment was referred to orthopedic surgeon, Anthony G. A. Pollock, M.D. Claimant saw Dr. Pollock on April 8, 1999. Claimant complained of tingling in his hands and fingertips, neck pain, and headaches. He also related symptoms in his left lower extremity. Claimant gave Dr. Pollock a history that he had these symptoms in his upper extremities since he was involved in a motor vehicle accident in 1979. Dr. Pollock recommended an epidural steroid injection to the cervical spine. The epidural steroid injection, however, did not benefit the claimant. In a letter dated April 26, 1999, to Dr. Piazza, Dr. Pollock recommended a

referral to a neurosurgeon to evaluate the neck injury. Also, the doctor opined that claimant may need decompression of his L4-5 disk space in the future.

Claimant's attorney hired Paul Rodriguez, M.D., to examine and evaluate the claimant. Dr. Rodriguez saw claimant on May 10, 1999. Claimant gave Dr. Rodriguez a history of the 1979 motor vehicle accident, 1982 weight-lifting incident, and the 1989 accident when he was chasing a suspect. The doctor conducted a physical examination of claimant and reviewed the MRI examinations of claimant's lumbar and cervical spine. His impression was chronic sprain and spinal stenosis of the lumbar spine, and osteoarthritis with multiple herniated disks of the cervical spine. He recommended claimant be restricted to sedentary work with an occasional 1-10 pounds of force. Furthermore, doctor indicated, "It is my opinion that any type of work that he did previously as a police officer [sic] would aggravate this condition and make it worse."

The Appeals Board finds, that the preliminary hearing record fails to prove it is more probably true than not that claimant's police patrol officer regular work activities permanently aggravated his preexisting conditions and made those conditions worse. This finding is supported by the medical records admitted into evidence at the preliminary hearing and claimant's own testimony. After claimant's last specific work-related accident that occurred in 1989, claimant remained symptomatic. But he did return to regular work and did not seek medical treatment for pain and discomfort as a result of these injuries until 1999. Claimant's family physician, Dr. Piazza's, medical records do indicate that on August 1, 1998, claimant saw the doctor complaining of left arm tingling, but claimant did not relate the symptoms to any specific activity. Claimant left his employment with respondent to retire based on age and service and not for disability. He then immediately started working for the County and indicated on the application that he had no impairments. After working for the County for one month, he saw Dr. Piazza complaining of pain in the upper extremities, neck, and headaches. In the history that claimant related to Dr. Pollock on April 8, 1999, he complains of tingling in his hands, fingertips, and neck pain. But he told Dr. Pollock he had those symptoms since the 1979 motor vehicle accident. Claimant's decision to withdraw his retirement request and return to his regular work as a police patrolman was not made until after he lost his job with the County. This indicates a belief by claimant that he could perform those job duties. The Appeals Board acknowledges that claimant has objective evidence of injury to both his cervical and lumbar spine. But the Appeals Board finds the more plausible explanation for those injuries are the specific accidents that occurred to the claimant while he was working for the respondent from 1979-1989 rather than either being caused or permanently aggravated by claimant's regular work activities.

Additionally, the Appeals Board finds the issue of timely notice of accident for the alleged series of accidents occurring each and every work day is moot and, therefore, does not need to be addressed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Jon L. Frobish's July 9, 1999, preliminary hearing Order should be, and it is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 1999.

BOARD MEMBER

c: Joni J. Franklin, Wichita, KS
 Edward D. Heath, Jr., Wichita, KS
 Jon L. Frobish, Administrative Law Judge
 Philip S. Harness, Director